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In the Supreme Court of the United States

OCTOBER TERM, 1957

HOTEL EMPLOYEES LOCAL NO. 255, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, ET AL., PETITIONERS

v.

BOYD LEEDOM, INDIVIDUALLY AND AS CHAIRMAN, NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 662

HOTEL EMPLOYEES LOCAL NO. 255, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, ET AL., PETITIONERS

v.

BOYD LEEDOM, INDIVIDUALLY AND AS CHAIRMAN, NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. 25–26) is not yet reported. The opinion of the district court (Pet. App. 27–33) is reported at 147 F. Supp. 306.

JURISDICTION

The judgment of the court below (Pet. App. 27) was entered on October 24, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Board's action in declining to assert jurisdiction over cases involving employer-employee relations in the hotel industry was a valid and proper exercise of its statutory discretion.[1]

2. Whether the Board's action in this case satisfies the requirements of the Administrative Procedure Act and due process.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*) and of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001, *et seq.*) are set forth at Pet. 3–8.

STATEMENT

I. Proceedings before the board

On June 29, 1955, Local 255 filed a representation petition under Section 9 of the Act with the Board's

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[1] The court below affirmed the judgment of the district court dismissing the complaint on the ground that the Board's declination of jurisdiction was a proper exercise of the Board's statutory discretion. Both courts, however, rejected the Board's alternative position that the complaint should have been dismissed in the first instance for want of jurisdiction in the district court to review a Board determination made, as here, in a representation proceeding. In the event this Court should grant certiorari, the Board desires to preserve this alternative contention as a basis for sustaining the judgment below. See *Langnes* v. *Green*, 282 U. S. 531, 535–539; *Walling* v. *General Industries Co.*, 330 U. S. 545, 547. The considerations generally applicable to this issue are set forth in the petition for a writ of certiorari in *Leedom* v. *Kyne*, No. 633, this Term, certiorari granted January 13, 1958, where a similar question is presented.

Regional Director for the Tenth Region (J. A. 3). In that petition Local 255 requested certification as bargaining representative of the employees of the hotels comprising the Miami Beach Hotel Association, a trade association of hotels in Miami Beach, Florida (J. A. 2). On July 1, 1955, the Board's Regional Director, after affording Local 255 an opportunity voluntarily to withdraw its petition, entered an order of dismissal stating in relevant part (J. A. 11):

> On October 26, 1954, the Board issued its Decision and Order in the *Virgin Isles Hotel, Inc.,* Case (110 NLRB No. 65) supplementing its recently announced standards for the assertion of jurisdiction and reiterating its long standing policy not to exercise jurisdiction over the hotel industry. Consequently, it does not appear that further proceedings are warranted inasmuch as it will not effectuate the policies of the Act to assert jurisdiction in this case.

Local 255, advised by the Regional Director of its right to obtain Board review of his order of dismissal, sought and obtained such review (J. A. 10). Briefs were submitted and oral argument was held on August 9, 1955 (*ibid.*). On August 26, 1955, the Board, one member dissenting, issued its determination sustaining the Regional Director's dismissal in accordance with its "long-established policy of not

asserting jurisdiction over the hotel industry * * *'' (J. A. 16–17).[2]

Subsequent motions for reconsideration filed by Local 255 on September 9, 1955, and January 27, 1956, were denied (J. A. 4).[3]

II. The instant suit

On January 12, 1956, Local 255 and its parent International, petitioners herein, instituted the present action in the district court (J. A. 1). The gravamen of their complaint was that the Board, in dismissing the representation petition filed by Local 255, "deprived the plaintiffs and their members of their right to participate in elections and other proceedings before the National Labor Relations Board * * * and of their constitutional and statutory right to organize and represent employees in the hotel industry" (J. A. 6–7). More specifically, petitioners asserted that the Board's dismissal of the representation petition violated the constitutional guarantees of due process and

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[2] Guy Farmer, then chairman of the Board, concurred in the Board's disposition of the instant case but suggested that the Board consider modifying its policy so as to take jurisdiction over the hotel industry on a limited basis pursuant to appropriate standards (J. A. 17). Member Murdock, the fifth Board member, dissented on the grounds he had previously stated in *Hotel Association of St. Louis*, 92 NLRB 1388, where the Board had likewise adhered to past precedent by declining to assert jurisdiction over the hotel industry—on that occasion, however, with the approval of the union which is urging reversal here.

[3] During this period also, the General Counsel, citing the Board's determination in the representation proceeding, sustained the Regional Director's refusal to proceed upon unfair labor practice charges filed by members of Local 255 against members of the Association (J. A. 4–5).

equal protection under the Fifth Amendment; violated Article I, Section 8 of the Constitution in that it constituted an assumption of legislative power; was in excess of the authority conferred upon the Board by Section 9 (c) of the Act; and was promulgated in violation of Section 4 of the Administrative Procedure Act (5 U. S. C. 1003 (J. A. 5–6)). On the basis of these allegations, petitioners asked for a declaratory judgment and injunctive relief to compel the Board to process the representation petition and to enjoin the Board from withholding its processes "on the sole ground that it does not effectuate the policies of the Act to assert jurisdiction over hotels" (J. A. 7–8).

The Board members, respondents herein, moved to dismiss the complaint or, in the alternative, for summary judgment in their favor on the ground that the district court lacked jurisdiction of the subject matter and on the further ground that the complaint failed to state a claim warranting judicial relief (J. A. 8–9). Petitioners, in turn, filed a cross motion for summary judgment in their favor (J. A. 51).

On January 8, 1957, the district court (Morris, J.) issued its opinion (Pet. App. 27–33). At the outset the district court observed (Pet. App. 29):

> The question of whether action, preliminary to unfair labor practice proceedings under Section 10 of the Act, plainly beyond the scope of statutory authority, whether by way of departure from statutory requirements or from those of due process of law, may be reviewed by the District Court in the exercise of its equity

> power has been decided for this jurisdiction in the case of *Farmer* v. *The United Electrical Workers*, 93 U. S. App. D. C. 178, 211 F. 2d 36; see also *DePratter* v. *Farmer*, decided by our Court of Appeals, February 2, 1956 [232 F. 2d 74], *Fay* v. *Douds*, 172 F. (2d) 720 (2d Circuit), and *Leedom, et al.* v. *International Union of Mine, Mill and Smelter Workers*, S. Ct. No. 57, decided December 10, 1956 [352 U. S. 145].

The district court then directed its attention to the question whether the Board's action was in excess of its statutory authority or violated due process requirements. As to the latter, the district court rejected petitioners' claim of prejudice for lack of a hearing. The court noted that petitioners, pursuant to permission granted by the Board upon review of the Regional Director's dismissal, had briefed and orally argued before the Board that existing circumstances warranted a departure from the Board's policy, theretofore endorsed by petitioners, of not asserting jurisdiction over employer-employee relations in the hotel industry in the several states (Pet. App. 30).[4]

On the question of the Board's statutory authority, the district court noted that Congress had lodged in the Board and not in the courts the determination as to what employer-employee relations so affect

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[4] As petitioners acknowledge (Pet. 9, 12), no issue of fact was involved. Accordingly, neither the National Labor Relations Act nor the Constitution required a hearing for the introduction of evidence. *Fay* v. *Douds*, 172 F. 2d 720, 725 (C. A. 2).

commerce as to require the assertion of its jurisdiction and, that absent arbitrariness or caprice, such a determination was within the Board's discretion (Pet. App. 30–31). Reviewing the history of the Board's jurisdictional policy respecting the hotel industry and available Congressional comment thereon, the court concluded that the Board's determination in the instant case could not be regarded as arbitrary or capricious (Pet. App. 31–33). Accordingly, the district court granted respondents' motion for summary judgment and denied petitioners' cross-motion for summary judgment (Pet. App. 33). The court entered its order dismissing the complaint on January 16, 1957 (*ibid.*).

Petitioners appealed from the judgment of the district court. Respondents reiterated their defense that the district court lacked jurisdiction of the subject matter of the action and that, even assuming such jurisdiction to exist, the dismissal of the complaint was proper. The court below, one judge dissenting, affirmed "on the opinion of District Judge Morris, 147 F. Supp. 306" (Pet. App. 25–26).

ARGUMENT

1. Assuming that the district court had jurisdiction in the first instance to review the Board's determination (but see fn. 1, *supra*, p. 2), its dismissal of petitioners' complaint was proper and the affirmance of that dismissal by the court below does not call for review.

Petitioners do not challenge the well-settled proposition that the Board has discretion in the interest

of better effectuating the policies of the Act to assert less than the full measure of its permissible jurisdiction. *National Labor Relations Board* v. *Denver Bldg. & Construction Trades Council*, 341 U. S. 675, 684. They urge, however, as a principal basis for invoking review by this Court, that this discretion is limited to unfair labor practices under Section 10 of the Act and does not exist where, as here, a representation proceeding under Section 9 of the Act is initiated (Pet. 12–16). In this connection, petitioners point out that under Section 10 (a) of the Act, the Board is "empowered" to prevent the commission of unfair labor practices whereas Section 9 (c) states that upon the filing of a representation petition "the Board *shall investigate* such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists *shall provide for an appropriate hearing upon due notice*" (emphasis added). Petitioners also note that Section 9 (c) of the Act prior to its amendment in 1947 was phrased in permissive terms[5] and that the change to "mandatory" language signified Congress' intent that the Board exhaust its jurisdiction in the representation field.

Petitioners' suggested reading of Section 9 (c), however, is not required by the literal language of that provision, finds no support in legislative history,

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[5] Section 9 (c) of the original Act read:

"Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy * * *. In any such investigation, the Board shall provide for an appropriate hearing upon due notice * * *."

and would lead to anomalous results obviously not intended by Congress and wholly at odds with prevailing judicial authority. Thus, although the Board is required by the language of Section 9 (c) to "investigate" all representation petitions, it is required to proceed further only where it has "reasonable cause to believe that a question affecting commerce exists * * *." In making this preliminary determination the Board has been guided by such considerations as the effect of the employer's operations upon commerce, the furtherance of the policies of the Act and, in the case of a petitioning labor organization, the number of adherents among the employees whom the labor organization seeks to represent. The courts, both before and after the 1947 amendments to the Act, have uniformly approved the Board's practice in this regard.[6] In this way both the administrative agency and the courts implement the basic policy of the Act which Congress declared in Section 1 of the Act to be the elimination of "the causes of certain *substantial* obstructions to the free flow of commerce * * *." (Emphasis added.)

Moreover, the total absence of relevant comment in the copious legislative history accompanying the

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[6] See for example, *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767, 770; *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U. S. 485, 492–493; *Optical Workers' Union* v. *National Labor Relations Board*, 227 F. 2d 687 (C. A. 5), rehearing denied, 229 F. 2d 170, certiorari denied, 351 U. S. 963; *Kearney & Trecker Corp.* v. *National Labor Relations Board*, 209 F. 2d 782, 787 (C. A. 7), and cases there cited. Cf. *Herzog* v. *Parsons*, 181 F. 2d 781 (C. A. D. C.), certiorari denied, 340 U. S. 810.

1947 amendments militates against the view that Congress intended so drastic a change in the Board's settled practice respecting its handling of representation cases. Petitioners cite no reference—and we are aware of none—suggesting that Congress entertained such an intent. Indeed, such references as are germane indicate that the amended language of Section 9 (c) "does not change the Board's rules of decision with respect to requirements of substantiality in order to obtain a hearing" but were designed merely to accord to employers and non-union employees the same right of petition enjoyed by unions. Sen. Rep. No. 105, 80th Cong., 1st Sess., pp. 10, 25; 93 Cong. Rec. 4143. Finally, it seems inconceivable that Congress would compel the Board to assert jurisdiction in every representation case, however minimal its impact upon commerce or its relation to the effectuation of the overall statutory policy, while permitting the Board at the same time to utilize those considerations as a basis for limiting its assertion of jurisdiction in unfair labor practice cases which frequently involve the same issues.[7]

2. Contrary to petitioners' claim (Pet. 16–21), the Board's determination not to assert jurisdiction over the hotel industry is neither arbitrary nor in conflict

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[7] For example, the Board would be required to issue certifications in representation cases where valid considerations would dictate that it not expend its energies in unfair labor practice proceedings brought to police those certifications. Similarly, the Board could under appropriate circumstances decline to entertain refusal to bargain cases where questions of representation were at issue but would be required to resolve those same questions if they were raised in representation cases.

with the ruling of this Court in *Office Employes Union* v. *National Labor Relations Board,* 353 U. S. 313. The Board's practice in this regard had its inception early in the days of the original Act. *White Sulphur Springs Co.,* 85 NLRB 1487, 1488 ("To assert jurisdiction here would be to reverse Board precedent untouched since the original Wagner Act was enacted 14 years ago."); *Hotel Association of St. Louis,* 92 NLRB 1388, 1389–1390; National Labor Relations Board, *Sixteenth Annual Report* (U. S. Gov't Print. Off., 1952), pp. 38–39. See also *National Labor Relations Board* v. *Eanet,* 179 F. 2d 15, 17–18 (C. A. D. C.); *Phillips Petroleum Co.* v. *National Labor Relations Board,* 206 F. 2d 26, 28–30 (C. A. 5).[8] The Board's underlying rationale was that the essential function of the hotel industry, namely, the furnishing of lodging for its customers while they are on the hotel premises, is local and has relatively slight impact upon interstate commerce. *Hotel Association of St. Louis, supra.* Senator Taft, as the opinion of the district court discloses (Pet. App. 31–32), was of the same mind and indicated that in his view it had not been the intention of the Committee of Labor and Public Welfare in 1947 "to broaden or extend the jurisdiction of the Board in

[8] Petitioners correctly note (Pet. 16, n. 5) that the practice has its exceptions. Thus, the Board, exercising a plenary jurisdiction in the District of Columbia, has always asserted jurisdiction over hotels located there. Similarly, the Board has, until recently, asserted jurisdiction over hotels located in the Territories. See *The Virgin Isles Hotel,* 110 NLRB 558.

that respect."[9] Moreover, the Board's practice has had the full support not only of the hotel industry but, until the instant case, of the International, petitioner herein, the largest labor organization in the industry. *Hotel Association of St. Louis, supra.* Under these circumstances where the Board's long-settled practice respecting the hotel industry has received endorsement from both Congressional and judicial authority as well as the support of the principals most directly affected, there is little warrant for a claim that the Board's action is arbitrary or capricious.[10]

Office Employes Union v. *National Labor Relations Board* is not dispositive of the instant case as the opinion plainly discloses. 353 U. S. at 320, fn. 13.

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[9] For other manifestations of legislative approval of the Board's practice respecting the hotel industry, see Hearings before the Subcommittees of the House Committee on Education and Labor and of the House Committee on Expenditures in the Executive Departments, 80th Cong., 2d Sess., pp. 2–9, 37–41 (May 7, 1948); H. Rep. No. 2050, 80th Cong., 2d Sess., pp. 2–5. See also Hearings before the Senate Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22, 80th Cong., 1st Sess., Part 4, pp. 2343–2344 (March 13, 1947) where the Committee's attention was directed to the Board's consistent policy respecting the hotel industry and amendments were proposed to change that policy.

[10] Petitioners point out (Pet. 3) that the instant case is part of the same controversy which is presently pending before this Court in cases Nos. 363 and 364, this Term, concerning the hotel industry in Miami and Miami Beach, Florida. Implicit in this reference would seem to be the suggestion that this Court should grant certiorari in the instant case in order that the whole controversy be presented before it. The suggestion is not well-founded. Assuming, *arguendo*, that the Florida courts erroneously regulated labor relations matters properly within the Board's jurisdiction, that error is remediable independently of the disposition of the instant case. Compare *Guss* v. *Utah Labor Relations Board*, 353 U. S. 1; *Garner* v. *Teamsters Union*, 346 U. S. 485.

In that case the Board, contrary to its previous practice, declined to assert jurisdiction over unions acting as employers in their normal functions for the reasons which had prompted the Board to refrain from asserting jurisdiction over non-profit organizations, for example, religious and educational institutions. This Court concluded, however, that the language of Section 2 (2) of the Act, specifically including labor organizations within the definition of the term employer subject to the Act, and its legislative history unequivocally compelled the conclusion that the Board's "arbitrary blanket exclusion of union employers as a class is beyond the power of the Board" [11] and that the Board could not justify such a result by the "unrealistic" analogy to religious and educational institutions (*id.* at 318–319). These considerations are not present here. Moreover, the underlying reasons for the Board's action in the instant case distinguish the hotel situation from the hypothetical situations posed by petitioners of a declination of jurisdiction in the steel, automotive and electrical industries.

3. Petitioners' further contention that the Board's action fails to satisfy the requirements of the Administrative Procedure Act and of due process presents no question appropriate for review in the instant case. As the district court observed (Pet. App. 30, *supra,* p. 6), petitioners were accorded full

[11] *Joliet Contractors Association* v. *National Labor Relations Board*, 193 F. 2d 833, 841 (C. A. 7), also relied upon by petitioners (Pet. 19), is based upon similar considerations applicable to secondary boycotts in the building and construction industry.

opportunity to be heard as to the propriety of the Board's declination of jurisdiction in the instant case,[12] and petitioner International, parent of petitioner Local 255, was likewise a full participant in the Board's earlier determination in the *Hotel Association of St. Louis* case. Finally, it is clear that the provisions of the Administrative Procedure Act were not intended to negate the familiar power of administrative agencies to develop and enunciate policies and interpretations on a case by case basis. *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[12] As already noted, fn. 4, *supra*, p. 6, the relevant facts were not in issue.

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